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83-805

IN THE
UNITED STATES SUPREME COURT

CHERYL WILCOX WILLIAMS,
Petitioner,

V.

TEXAS DEPARTMENT OF HUMAN RESOURCES, and TARRANT COUNTY CHILD WELFARE DEPARTMENT,
Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the termination of Petitioner's parental rights under the applicable Texas statute was violative of her right to due process of law and liberty interests protected by the Fifth and Fourteenth Amendments where the applicable statute does not require that the trier of fact find that the State's legitimate interest in the protection of minor children could not be served by imposition of a less extreme and restrictive remedy?

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SUMMARY OF ARGUMENT

Petitioner has alleged that termination of her relationship with her children violated her right to due process of law because Texas law does not require the trier of fact to find that there is no less restrictive remedy than termination which will serve the State's legitimate interest in protecting children. The State Court of Appeals reviewed the evidence and found it constitutionally sufficient to satisfy due process requirements. Because the Texas Family Code provisions covering termination recognize and protect the interest asserted by Petitioner, this Court should not grant the petition for certiorari.

ARGUMENT

In the present case the Petitioner argued in the state courts that Texas Family Code, Section 15.02 (Vernon 1982) was unconstitutional *as applied* to her because it did not require the state to prove, and the evidence did not show, that no remedy less restrictive than termination existed.

The facts of Petitioners case are as follows:

> The evidence at trial showed that the Department of Human Resources received two referrals dealing with these children. The first one was January 1, 1981 and the medical records introduced at trial showed that J.W. had a fractured arm and bruises. The child was eight months old at the time. The injury supposedly happened when the baby fell out of his bed. At trial the mother stated that the injury happened while she was at work and her boyfriend was baby-sitting the children. Other witnesses testified that the mother admitted to them that she was present when the baby's arm was broken.
>
> The second referral came on January 30, 1981 when J.W. was taken to the hospital by his grandmother. The mother testified that she noticed nothing wrong with the child when she took him to the baby-sitter that morning. Dr. Bruce, the doctor who examined the child at the hospital; testified at trial that J.W. had a broken leg which was very swollen and that the average person should have noticed it. Moreover, she said that the leg had been broken for at least two weeks. J.W. also had a skull fracture, bruises on his face, back, sternum and thigh, and two healing scars. Pamela Norton, a social worker, went

to the sitter's house to speak with T.W., the little girl, who had bruises on her face also.

The mother testified that the broken leg could have happened when the baby fell off her lap some days prior to his hospital visit. Dr. Bruce testified that it would be unlikely that a simple fall would produce the kind of fracture J.W. had. She stated it would take a fairly severe force with some twisting to cause the fracture. The mother's boyfriend (and now husband) pled guilty to injurying J.W.

Dr. Cooley, a psychologist who examined the natural mother, testified that the little girl, T.W., was afraid of her stepfather. From her behavior and responses she appeared to have experienced trauma. He also testified that the children's mother would fail to recognize signs of abuse.

The mother admitted at trial that she thought her boyfriend had injured her child because he was the only one home when the little boy's arm was broken in December. She continued to leave her children with him, however, and they were injured again.

Opinion of the Court of Appeals (Petition for writ of Certiorari, Apend. A, p. 2A.)

On the basis of this evidence, the appellate court found clear and convincing evidence to support the jury's findings that Petitioner had knowlingly endangered her children *and* that it was in the children's best interest to terminate Petitioner's parental rights.

In response to Petitioner's factual contention that she should have been given more time in which to rehabilitate herself, the Court should note that these children were

removed in January of 1981 and that the termination hearing was in May of 1982.

The issue presently presented by Petitioner for the first time is whether or not Section 15.02 of the Texas Family Code is, *on its face*, violative of her right to due process of law because it does not require a *finding* in each case that the State's legitimate interest in the protection of children could not be served by a less extreme and restrictive remedy than termination. The proof which is required by Section 15.02 satisfies the requirements of due process.

Texas Family Code, section 15.02 sets out a two-pronged approach to involuntary termination of parental rights. Subsection (1), (A) through (K), sets out facts which must be proven to show a parent unfit. Subsection (2) provides that termination must also be in the best interest of the child involved for involuntary termination to be ordered. Termination cannot be supported by proof satisfying only one of the subsections, and proof must be by clear and convincing evidence. In determining the "best interest" question a trier of fact must necessarily consider those protected interests asserted by petitioner.

Starting from the presumption that the best place for a child is with its parents (*Wiley v. Spratlan*, 543 S.W.2d 349 (Tex.1976)), the fact finder must determine whether or not termination is necessary in the child's best interest. A list of factors which must be considered in determining best interest includes but is not limited to the following: (A) the desires of the child; (B) the emotional and physical needs of the child now and in the future; (C) the emotional and physical danger to the child now and in the future; (D) the parental abilities of the individuals seeking custody; (E) the programs available to assist these individuals to promote the best interest of the child: (F) the plans for the child by these individuals or by the agency seeking custody; (G) the stability of the home or proposed placement; (H) the acts or omissions of the parent

which may indicate that the existing parent-child relationship is not a proper one; and (I) any excuse for the acts or omissions of the parent. *Holly v. Adams*, 544 S.W.2d 367 (Tex. 1976).

In considering the child's "best interest" Texas law provides protection for the liberty interest asserted by petitioner. The fact that no specific finding is required concerning alternatives to termination in no way affects the requirement that they be considered.

Respondent asserts that the facts support termination in the present case and that no constitutional harm is presented by the fact that the Texas statute does not specifically require a finding by the fact finder that no less restrictive alternative exists.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been sent via U.S. Mail, certified, return receipt requested on this the _____ day of _____, 1983 to Mr. Randy Taylor, 1015 Elm, Suite 2110, Dallas, Texas 75202 and Mr. J. Thomas Sullivan, 400½ Cortez Place, Santa Fe, New Mexico 87501.

_____

DAVID R. RICHARDS
Executive Assistant
Attorney General